

² Appellant submitted financial evidence with her appeal to the Board. The Board cannot consider this evidence as its jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. *J.T.*, 59 ECAB 293 (2008); 20 C.F.R. § 501.2(c)(1).

required repayment of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation.

On appeal appellant asserts that some expenses were incorrectly listed by the hearing representative and some expenses had increased, generally contending that repayment of the overpayment would cause financial hardship.

FACTUAL HISTORY

On September 16, 1994 appellant, then a 47-year-old automation clerk, sustained an employment-related left knee sprain when she tripped on a rug at work. She stopped work that day. OWCP accepted that she sustained a left knee sprain and left lateral meniscus tear. Appellant underwent arthroscopic repair on December 9, 1994. Appellant received appropriate continuation of pay and compensation.

On July 9, 1996 appellant returned to work for one day weekly. In a December 17, 1996 decision, OWCP determined that her actual part-time earnings fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly. Disability retirement was approved in March 1997. By letter dated April 3, 1997, OWCP informed appellant that she must elect either civil service annuity benefits or FECA benefits. It advised her that, if she elected FECA benefits, these would be reduced by Social Security Act (SSA) benefits paid on the basis of age and attributable to her federal employment. Appellant elected FECA benefits, effective April 9, 1997. She continued to receive compensation on the periodic compensation rolls.

The record includes a series of EN1032 forms signed by appellant on March 24, 2010, March 12, 2011, February 12, 2012, February 16, 2013, and February 18, 2014 in which she indicated that she was not receiving SSA benefits or payments.

In July 2013 OWCP requested information from SSA as to whether appellant was receiving SSA benefits. On July 10, 2013 SSA acknowledged that she was receiving SSA benefits and provided the amount of SSA benefits with and without Federal Employees' Retirement System (FERS) benefits, effective February 2009. On July 18, 2013 OWCP informed appellant that on July 28, 2013 her FECA benefits were being reduced to reflect the contribution from FERS to her SSA benefits.

On October 31, 2013 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$10,477.27 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, which she had received from February 1, 2009 to July 27, 2013, was based on credits earned while working in the Federal Government, and that the portion of her SSA benefits based on those credits was a prohibited dual benefit. OWCP found appellant without fault. An overpayment worksheet indicated that she received compensation of \$69,174.04 for the period February 1, 2009 to July 27, 2013 when she should have received compensation of \$58,696.77, which yielded an overpayment of \$10,477.27.

Appellant requested a prerecoupment hearing and provided a completed overpayment questionnaire in which she indicated that she had monthly household income of \$3,840.79 and expenses of \$3,421.62 which increased to \$3,548.38 every third month for water and sewer. She

submitted Maryland and federal income tax returns for the years 2010, 2011, and 2012, one page of a bank statement, information concerning her husband's annuity, and documentation of some expenses.

In April 2014 OWCP additionally determined that appellant had been underpaid because her compensation from the date of injury had been based on the 2/3 rate when, in fact, she had been married the entire time and was therefore entitled to the augmented 3/4 rate. It determined that for the period November 1, 1994 through March 8, 2014 she had received compensation totaling \$257,542.24 when she should have received \$289,526.07 in compensation, which yielded an underpayment of \$31,983.83. On April 28, 2014 a payment in that amount was deposited into appellant's bank account. Her compensation was then adjusted, effective March 9, 2014, to reflect the 3/4 compensation rate.

Appellant and her son testified at the hearing, held on June 10, 2014. She indicated that her expenses were approximately the same as those provided on the overpayment questionnaire and that some of the \$31,983.83 underpayment remained. Appellant stated that they renovated bathrooms and put up a fence, spending about \$14,000.00, with approximately \$9,000.00 spent catching up on their mortgage. When questioned by the hearing representative, she indicated that she could repay the overpayment at a rate of approximately \$100.00 monthly. Appellant's son testified that both she and her husband were in poor health. The hearing representative informed appellant that she could submit additional evidence regarding increased expenses.

By decision dated August 20, 2014, an OWCP hearing representative found that an overpayment of compensation in the amount of \$10,477.27 had been created for the period February 1, 2009 through July 27, 2013 because appellant received dual benefits under FECA and SSA. She found appellant without fault and denied waiver. The hearing representative listed some of the expenses that appellant claimed, increased her monthly income to reflect the new augmented 3/4 compensation rate, and determined that she had \$4,012.00 in monthly income and \$3,464.87 in monthly expenses. She set an overpayment recovery at the rate of \$400.00 each compensation period. The hearing representative further found that, because appellant had approximately \$10,000.00 remaining from the underpayment of \$31,983.83, even if her expenses exceeded her income, she would not be entitled to waiver as she had over \$8,000.00 in assets.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁴ Section 10.421 of the implementing regulations provide, an employee may not receive compensation for total disability concurrently

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8116(a).

with separation pay.⁵ FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁶ When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.⁷

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation beginning in 1994 and that she received SSA benefits from February 1, 2009 to July 27, 2013. The portion of the SSA benefits appellant earned as a federal employee is considered a prohibited dual benefits under FECA.⁸ SSA notified OWCP of the applicable SSA rates and their effective date as it pertained to appellant. Based on these rates, OWCP was able to calculate the dual benefit appellant received from February 1, 2009 to July 27, 2013 which yielded an overpayment of compensation in the amount of \$10,477.27. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period February 1, 2009 to July 27, 2013 and finds that OWCP properly determined that appellant received dual benefits totaling \$10,477.27 for that period, thus creating an overpayment in compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."⁹ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.¹⁰

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data

⁵ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁶ FECA Bulletin No. 97-9 (issued February 3, 1997).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

⁸ *Supra* note 5.

⁹ 5 U.S.C. § 8129.

¹⁰ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.¹¹ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹² Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹³

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁴

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁵ The Board finds that OWCP did not abuse its discretion by denying waiver of recovery of the overpayment of compensation.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹⁶ Appellant submitted an overpayment questionnaire on November 19, 2013. She testified at the hearing that her expenses were essentially the same as reported. In the November 2013 questionnaire, appellant reported monthly income of \$3,840.79 and monthly expenses varying between \$3,421.62 with an increase to \$3,548.38 every three months to cover sewer and water bills.

The Board, however, notes that appellant's monthly income had increased at the time the final overpayment decision was issued. Appellant's FECA compensation had increased to

¹¹ 20 C.F.R. § 10.436(b).

¹² *Id.* at § 10.437(a).

¹³ *Id.* at § 10.437(b).

¹⁴ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁵ *Supra* note 8.

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (June 2009).

\$1,232.39 each 28-day compensation period, or \$1,334.00 monthly. When added to her additionally reported income, this yielded monthly income of \$4,114.61.¹⁷ Thus, appellant's documented monthly income exceeded her reported expenses by approximately \$651.00.

As appellant's reported income exceeded her reported ordinary expenses by more than \$50.00, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses. Thus, she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA.¹⁸ It was therefore not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceeded the allowable resource base.

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁹ Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience, stating that the hearing representative incorrectly listed her expenses and that some expenses had increased.²⁰ The Board notes that, at the hearing, appellant was advised that she could submit additional evidence if her expenses had increased. Appellant did not do so.

Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²¹ OWCP procedures provide that to establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²² An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²³

¹⁷ Appellant reported that her SSA monthly income was \$619.00, her husband's SSA income was \$1,293.00, and his monthly annuity compensation was \$868.61.

¹⁸ *Supra* note 10.

¹⁹ 20 C.F.R. § 10.437(a).

²⁰ OWCP procedures provide that ordinary and necessary living expenses include fixed expenses such as food, clothing, furniture, household, and personal hygiene supplies, rent, mortgage payments, utilities, maintenance, burial plot or prepaid burial contract; accident, health, life, and vehicle insurance; taxes; vehicle expenses and commuting expenses not included under vehicle expenses; medical expenses, church and charitable contributions made on a regular basis; and miscellaneous expenses not to exceed \$50.00 per month. The procedures add that consumer debt should not be calculated if the expenses are included in the fixed expenses. *Supra* note 15 at Chapter 6.200.6.a(3) (June 2009).

²¹ 20 C.F.R. § 10.437; *see W.P.*, 59 ECAB 514 (2008).

²² *Supra* note 15 at Chapter 2.600.b(3) (June 2009).

²³ *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

Appellant submitted no evidence to show that she gave up a valuable right or changed her position for the worse in reliance on anticipated compensation payments. Thus, she has not shown that, if required to repay the overpayment, she would be in a worse position after repayment other than if she had never received the overpayment at all. OWCP properly found that she was not entitled to waiver on the grounds that recovery would be against equity and good conscience.²⁴

As appellant failed to establish that recovery of the overpayment in compensation would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$400.00 per compensation period. The record indicates that appellant's monthly income exceeds her reported monthly expenses by approximately \$651.00 per month. OWCP therefore did not abuse its discretion in finding that appellant should repay the overpayment at the rate of \$400.00 per compensation period.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,477.27 and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$400.00 every 28 days from her continuing compensation payments.

²⁴ *Supra* note 15.

²⁵ 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board